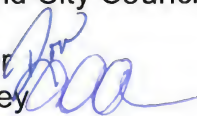


Staff Report

Date: December 20, 2016

To: The Honorable Mayor and City Council

From: Ron Davis, City Manager
Amy Albano, City Attorney 

Subject: Burbank Hospitality Association's (BHA) Donation to "Yes on Measure B Committee," BHA and City Agreement and BHA Governance

RECOMMENDATION

Direct staff to do the following:

1. Urge BHA to provide Brown Act training to its Board and staff; and provide the training to new Board members as seated;
2. Reduce the TBID's FY 2016/17 budget by \$50,000. This may be accomplished by suspending collection of the assessment for an appropriate period of time;
3. Bring back an amendment to the TBID agreement, as well as the Downtown PBID agreement, prohibiting assessment funds from being used for political campaigns. The next time any management district plan is being considered by Council add a provision prohibiting assessment funds from being used for a political campaign; and
4. Negotiate amendments to the BHA/City agreement to remove the CD Director as a voting member of the board; convert payment for City staff program services to a time and material basis; provide that BHA must provide its own administrative functions including legal through its own staff or contracting with another private entity; require BHA to have its own office address and not use City facilities for Board meetings.

BACKGROUND

During public communications at the City Council meeting of December 6, 2016, members of the public reported that BHA donated \$50,000 to the "Yes on Measure B Committee" (Yes on B) and allegedly violated the Brown Act when the BHA Board voted to donate the \$50,000. In response to public comments, the City Council directed the City Attorney to look into the matter and report back to the City Council, which is the purpose of this report.

The donation of the \$50,000 to Yes on B was not an appropriate expenditure by BHA, as more fully explained below. Although there appears to be no intent to violate the law

by BHA, there is a clear perception of impropriety, as you heard from members of the public.

The City Council originally created the Tourism Business Improvement District (TBID) in 2011, pursuant to Streets and Highways Code Section 36600, et. seq. ("BID Law"), and designated BHA to administer the program. The Council renewed the TBID for another 10 years in May 2016. Pursuant to BID Law, the City imposes an assessment on hotels with over 25 rooms. The assessment is to fund the purpose of the TBID, which is to increase room night sales for the 17 eligible hotels. When Council renewed the TBID, Council approved the Management District Plan ("Plan" a copy is attached as Exhibit A), which, in part, spells out the use of the assessments collected.

BHA is a non-profit mutual benefit cooperation and, under the BID Law, BHA is an owners' association since it is under contract with the City to administer the Plan. The BID Law provides, in part:

"An owners' association is a private entity and may not be considered a public entity for any purpose, nor may its board members or staff be considered to be public officials for any purpose. Notwithstanding this section, an owners' association shall comply with the Ralph M. Brown Act...and with the California Public Records Act..."
(Streets & Highway Code § 36612, emphasis added.)

This section of the law was enacted in response to an earlier case¹ that held a non-profit, like BHA, was created by the Council, and therefore subject to the Brown Act. The new law specifically applied the Brown Act and Public Records Act to a non-profit like BHA. More importantly, however, the law refuted the broader language in that case, by clearly articulating that a non-profit owners' association, like BHA, is not a public entity nor are its board members public officials.

DISCUSSION

Brown Act

Did BHA violate the Brown Act when it voted to donate the \$50,000 during its September 14, 2016, meeting?

The Brown Act provides that a body subject to it, such as BHA, shall not take action or discuss any item not appearing on the posted agenda (Gov't Code § 54954.2 (a) (2)). There are exceptions not relevant to this discussion (Id.). The Board's September 14, 2016 agenda is attached as Exhibit B. The agenda did not list donation to Yes on B. The Board recognized that the item was not on the agenda, but considered it under the agenda item "Ongoing Operational Issues." On the same agenda a separate item was listed for "YMCA Turkey Trot Sponsorship and under "Ongoing Operational Issues" "...request to transfer \$100,000 to pay...invoices" was listed.

¹ Epstein v. Hollywood Entm't Dist. II Bus. Improvement Dist. (2001) 87 Cal. App. 4th 862.

Clearly, the vote taken by the BHA on the donation, at its best, is a violation of the spirit of the Brown Act and at its worst is an actual violation of the Act. This Board does not have legal counsel at its meeting and it is my understanding that the Board and staff have not gone through current Brown Act training. City Attorney's Office (CAO) would advise any City Board to delay action in a similar situation. Based on the above facts, however, there appears to be a lack of criminal intent by BHA to violate the Act.

As to the BHA minutes on this item (Exhibit C), the minutes state in part that "Mr. Garibian made a motion to approve, second by Mr. Khan, with one abstention from Lucy Burghdorf." I read this to mean that the vote was otherwise unanimous of the Board members present. The minutes also list, who was present and who was absent. In my opinion, there is no Brown Act violation concerning the minutes.

Recommendation: To ensure that the spirit and letter of the Brown Act is complied with in the future, the BHA Board and staff should receive Brown Act training.

TBID Expenditures

Did the \$50,000 donation violate the City's agreement with BHA and/or the Plan for the TBID?

The \$50,000 donation was an inappropriate expenditure under the Plan. The Plan approved by Council in May 2016 and the agreement between Council and BHA approved in August 2016, requires that assessments collected be spent pursuant to the Plan. As stated above, the purpose of this TBID is to increase hotel room rate sales. The Plan allows expenditures for sales and marketing with "a central theme of promoting Burbank as a desirable place for overnight visits. The program will have the goal of increasing overnight visitation and room night sales at assessed businesses..." and then lists specific activities (Plan page 9). The donation is not a specific marketing tool to lure visitors to Burbank nor is it a sales activity. Although one can understand how the Board may believe that supporting construction of a new replacement terminal could lead to more visitors, the donation to "Yes on B" is not a marketing/sales program. The Plan also allows 20% of the annual budget to go to destination development, but the parameters of this program have not yet been determined (Id.). And clearly, the donation to the Yes on B campaign is not destination development. Based on the foregoing, the donation does not fall within the parameters of sales and marketing nor destination development, as announced in the Plan.

The TBID budget runs on a fiscal year July through June. The budget for FY 2016-2017 was approximated at \$789,000 (Plan, page 8). The assessments are collected from the 17 hotels by the City on a monthly basis and the hotels are allowed to pass the assessment through to hotel guests. Since \$50,000 of assessment funds was spent inappropriately and BHA has no other source of funding to return the funds, staff recommends the following remedy.

Recommendation: direct staff to reduce the TBID's FY 2016/17 budget by \$50,000. This may be accomplished by suspending collection of the assessment for a minimum

of 23 days or longer until the budget is reduced by \$50,000. The City is able to calculate the reduction based on the Transit Occupancy taxes reported and received.

To prevent TBID assessments or any other business improvement district assessments to be used for political campaigns in the future, staff has the following recommendation.

Recommendation: direct staff to amend the TBID agreement, as well as the Downtown PBID agreement, to prohibit assessment funds from being used for political campaigns. The next time any management district plan is being considered by Council add a provision prohibiting assessment funds from being used for a political campaign.

The BID Law provides that any district may be disestablished by the City Council, if a Council finds there has been misappropriation of funds, malfeasance, or a violation of law in connection with the management of the district (Streets and Highways Code §36670). This is a nuclear bomb remedy and does not seem fitting to use under the circumstances here. The TBID has been a very successful program for the City's hotels, which, in part, is why a majority of the Council voted to renew the TBID for another 10 years. The TBID raises much needed funds to promote Burbank as a visitor destination in a comprehensive, cohesive manner. There has been no past problems concerning BHA and staff has outlined recommendations to ensure the current situation does not repeat itself. Therefore, staff does not recommend that the Council consider disestablishment of the TBID.

One other potential remedy is for the City to make a claim against the BHA Board (and its insurer) for return of the \$50,000. Staff is not recommending this remedy at this time. More than likely, such a claim would result in litigation with the City having to prove a breach of the agreement and the insurer having to accept the claim as covered. If, however, in the future, there is a finding, as described below, that the donation was a prohibited use of public resources, then the City may wish to reconsider this remedy.

BHA Governance

What can be done to sharpen the lines between the City and BHA?

One of the things that made the optics of the donation even worse is the structure of BHA. It is true that the City assisted in establishing BHA when the TBID was originally created in 2011. The Community Development Director serves as a voting member of the Board and City staff provides both administrative services, as well as program services to BHA. BHA pays for these services by City retaining 17% of all assessments. After five years the TBID is now extremely successful, and is at a point where it should and needs to function without City staff involvement in its governance. Staff recommends a disentanglement between City staff and BHA as it relates to BHA's governance. Following the recommendations below will assist in clarifying the roles and functions of the City, as a public entity, and BHA, as a private non-profit, as contemplated under the BID Law.

Recommendation: direct staff to negotiate amendments to the BHA/City agreement to remove the CD Director as a voting member of the board; convert payment for City staff

program services to a time and material basis; provide that BHA must supply its own administrative functions including legal through its own staff or contracting with another private entity; require BHA to have its own office address and not use City facilities for Board meetings.

Public Resources

Was the \$50,000 donation to Yes on B an unauthorized campaign activity under the law?

The relevant statute is Government Code Section 54964.5, which is specific to nonprofit organizations. The statute prohibits the use of public resources for campaign activity not authorized by law. The law is enforceable by the State Attorney General or District Attorney. There is no case interpreting this section. The Epstein case (cited in footnote 1) contained dicta that the assessments in that case were public funds². But stating that funds are public begs the question of whether the funds in a certain scenario are public resources under the statute. The statute defines "Public resources" as any property or **asset owned by a local agency**, including, but not limited to, cash, land, buildings, facilities, funds, equipment, supplies, telephones, computers, vehicles, travel, and local government compensated work time that is provided to a nonprofit organization, except funds received in exchange for consideration for goods or services. And excludes incidental or minimal use of public resources from the definition of campaign activity.

One could argue both sides of the issue. On one hand, the argument is that TBID assessments are not assets owned by the City since the funds are held in trust for the TBID. And under BID Law, upon expiration of a district remaining revenues may go back to the assessed businesses; and not to the City (Streets and Highways Code §36671). Therefore, the argument concludes that use of the assessment funds is not subject to this Government Code prohibition (although the donation, as explained above, was not in conformance with the Plan). The opposite argument is that since the assessments are levied by the City, the City through the BID Law dictates use of the funds by approval of a management district plan, and thus City controls the funds. Therefore, the funds are owned by the City and are a public resource. Ultimately, either the courts or legislature will settle this question. The legislature in a recent amendment to this section, added to the definition of public resources funds received from activities related to conduit bond financing.

At this time, there is no need for the Council to make a determination on whether the Council believes the assessment funds are or are not a public resource. This is especially true since enforcement of the applicable Government Code Section is not within its purview. If a future administrative body or court does find that the donation was a prohibited use of public resources, then the Council may wish to revisit the matter to see if further Council action is necessary.

² If language in a case is dicta, meaning not essential or relevant to the holding of the case, it has no precedential value to future cases.

CONCLUSION

The donation by BHA to Yes on B should not have been made. However, given the positive history between the City and BHA and the success of the TBID, staff believes that the above recommendations will prevent the situation from occurring again.

EXHIBITS

Exhibit A - Management District Plan

Exhibit B – BHA Board's September 14, 2016 Meeting Agenda

Exhibit C – BHA September 14, 2016 Meeting Minutes